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Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

In Re: PRUDENTIAL INSURANCE COMPANY OF AMERICA SALES PRACTICE LITIGATION,

PAUL J. BERRAFATO,

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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73 pp

QUESTIONS PRESENTED

1. Is arbitral review in the Third Circuit so narrow that the comprehensive remedial scheme of ERISA no longer exists there?

2. Do "Not precedential" or unpublished opinions violate Article III?

LIST OF PARTIES

The parties are Paul J. Berrafato and The Prudential Insurance Company of North America.

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Paul Berrafato, Petitioner, by undersigned counsel, under appropriate rules of this Court, requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Third Circuit.

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND NASD AWARDS

This is an ERISA case. It was sent to NASD arbitration by the District Court of New Jersey, and tried in Buffalo, New York. The panel issued two awards. Prudential filed an FAA confirmation petition in the District of New Jersey; the District Court confirmed the award (memorandum opinion), and the Third Circuit affirmed (not precedent decision), then denied rehearing.

CONCISE STATEMENT OF JURISDICTIONAL GROUNDS

The Berrafato ERISA discharge case was sent to NASD arbitration by Judge Wolin (District Court of New Jersey) on March 10, 1998, citing *In re the Prudential Insurance Company of America Sales Practice Litigation All Agent Actions*, 133 F.3d 225 (3rd Cir. 1998) (Held, since Prudential was a member of the National Association of Securities Dealers, the NASD rule requiring arbitration of disputes between members and associated persons applies).

However, Prudential was not a member of NASD.[1] Prudential's counsel misrepresented Prudential's NASD membership to the Third Circuit. Unbeknownst to Berrafato, NASD never had jurisdiction to adjudicate his case. Berrafato won his full retirement benefits, but the NASD panel denied a counsel fee and costs.

If Berrafato's counsel tried to vacate the award on jurisdictional grounds, he would jeopardize Berrafato's lifetime pension, health care and spousal benefits. The canons of ethics forbid jeopardizing a client's interests for any reason.

NASD released the arbitration award to Prudential first,[2]

1. Prudential resigned from NASD in May, 1996, following a series of securities violations by its subsidiary, Prudential Securities.

2. The arbitrators signed the award on September 9th, 10th and (Cont'd)

in violation of NASD rules, facilitating Prudential's preemptive FAA petition to the District of New Jersey.[3] Judge Wolin affirmed. The Third Circuit affirmed Judge Wolin's review, and marked their opinion "not precedential" under IOP rule 5.3. Jurisdiction here is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The pertinent Constitutional Provisions, Statutes and Rules are:

1. Article III, Section 1, clause 1 of the Constitution of the United States.
2. Employee Retirement Income Security Act, 29 U.S.C.A. § 1132(a)(1)(B).
3. Federal Arbitration Act, 9 U.S.C.A. § 10.
4. Code of Professional Conduct, Sections 3.3, 3.4.
5. Third Circuit IOP rule 5.3.

CONCISE STATEMENT OF THE CASE

Berrafato was fired in January of 1997. He filed an ERISA action in the Northern District of New York (Syracuse) on June 17, 1997. Prudential filed notice of related action to put the case into the Multi district litigation (back to Newark) on June 27, 1997. Prudential moved to compel arbitration and stay the case in New York on August 25, 1997. The Multi district panel transferred it to New Jersey on October 17, 1997, and Judge Wolin sent it out to NASD arbitration in New York on March 10, 1998, saying:

(Cont'd)

14th. The NASD "date of service" is marked September 29th, 1999. Prudential's counsel in the Newark area filed a 16 page Petition to Confirm in Part and Vacate in Part on September 29th in the District of New Jersey. NASD faxed the award to Berrafato's counsel and to Prudential's counsel in Washington, D.C. on October 1, 1999.

3. Had the award been appealed to the Western District of New York, where it was tried, it probably would have been vacated (at least in part) for lack of jurisdiction. *See Gaghich v. Prudential*, 1997 WL 128269 (W.D.N.Y.); *Burns v. New York Life*, 1999 WL 101773 (S.D.N.Y.).

> Whereas the Third Circuit has held in In re The Prudential Insurance Company of America Sales Practices Litigation All Agent Actions, 133 F.3d 225 (3d Cir. 1998), that Prudential can compel former sales agents to arbitrate their employment disputes pursuant to the National Association of Securities Dealers Code of Arbitration Procedure, It is on this 10th day of march, 1998, ORDERED that the above-referenced individual agent action is dismissed without prejudice.[4]

Berrafato's case was tried in Buffalo before an NASD panel in separate sessions in 1999.

Judge Wolin's arbitration referral order was an over-broad interpretation of the Third Circuit opinion in *In re The Prudential Insurance Company of America Sales Practices Litigation All Agent Actions*, 133 F.3d 225 (3d Cir. 1998).

In 1998 the Third Circuit Court of Appeals decided that the Prudential agent discharge cases before them (all with 1995 docket dates) were eligible for NASD arbitration and should be sent to NASD arbitration. Judge Seitz clearly held that Prudential could compel arbitration in agent discharge cases solely because of their NASD membership:

> There is no question that Prudential is a member of the NASD, and the plaintiffs are associated persons within the meaning of the Code. [FN7] Thus, we conclude, as did the district court, there is a clear and unequivocal intent to arbitrate claims with third parties such as Prudential, and not just Pruco, to the extent they are eligible for arbitration under § 1 [of the NASD code]. . . .

133 F.3d 225 at page 229 (3d Cir. 1998).[5]

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4. U.S. Dist. Court for District of New Jersey, MDL No. 1061, Master N.J. Civ. No. 95-4704, N.J. Civ. No. 97-5044.

5. *In re the Prudential Insurance Company of America Sales Practice Litigation All Agent Actions*, 133 F.3d 225 (3d Cir. 1998).

This judicial conclusion relied on a letter representation by Prudential's attorney that Prudential was a member of NASD.

Prudential's letter was untrue when written. Prudential resigned from NASD in May of 1996, following securities violations by its subsidiary, Prudential Securities (PruSec). *In Re Prudential Securities Inc.*, Securities Exchange Act Rel. No. 34-33082 (Oct. 21, 1993). In 1996, PruSec committed additional wrongdoing, and Prudential left NASD.

Immediately after the Third Circuit decided for Prudential, Prudential wrote to the panel and told them the truth, adding that the misrepresentation did not affect the case holding, since all of the agent discharge cases on appeal were 1995 cases and arose *before* Prudential resigned from NASD. The correction letter (dated January 12, 1998) says:

> We write to advise the Court that this sentence of the opinion ["it is undisputed that Prudential is a member of NASD"], while accurate at all times relevant to the issues on this appeal, does not reflect the fact that Prudential ceased to be a member of the NASD in May of 1996 after Prudential moved to compel these plaintiffs to arbitrate and Judge Wolin issued the decision below. The pertinent facts, however, remain undisputed. As the record on appeal confirms, Prudential was a member of the NASD at the time each of the agents executed their U-4s, at the time their employment with Prudential ended, and when Prudential moved to compel them to arbitrate their disputes with the company.

Prudential implied that post-resignation discharge cases (after May, 1996) were not eligible for NASD arbitration.[6]

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6. By this time Prudential established that post-resignation discharge cases are not eligible for arbitration, at least in New York. *See Gaghich v. Prudential*, 1997 WL 128269 (W.D.N.Y.); *Burns v. New York Life*, 1999 WL 101773 (S.D.N.Y.)

Berrafato's case is a post-resignation case and should not have been sent to NASD arbitration.

Prudential sent a copy of the *post facto* correction letter to Judge Wolin in Newark. Notwithstanding the correction letter and its clear import, Judge Wolin sent all agent discharge cases to NASD arbitration, citing the Third Circuit opinion, no matter whether they arose before Prudential resigned from NASD or afterwards.

The NASD panel unanimously awarded Berrafato all his disability benefits and full retirement pension, saying his discharge was "arbitrary and capricious;" the panel denied Berrafato's counsel fee request, refused to sanction Prudential for withholding plan documents, and denied Berrafato's defamation claim.[7] NASD sent the award to Prudential first,[8] so Prudential would have time to file an FAA Petition back in the District Court of New Jersey, where it would be assigned to Judge Wolin, and not run afoul of New York case law.[9] Prudential filed their preemptive FAA petition on the same day the arbitration award came out (September 29, 1999). Berrafato's counsel was faxed the award on October 1, 1999, after Prudential had established the District Court of New Jersey and the Third Circuit as venue for further proceedings. *Cortez Byrd Chips v. Harbert*, 529 U.S. 193, 120 S. Ct. 1331 (2000) (Held, FAA appeal venue is not mandatory). Berrafato filed a cross Petition to Vacate in part and Confirm in part.

7. The award contains no explanations. See George Nicolau's criticism of NASD arbitration: *Gilmer v. Interstate/Johnson Lane Corp.: Its Ramifications and Implications for Employees, Employers and Practitioners*, 1 Univ. of Penna. Journal of Labor and employment Law 177 (1998).

8. NASD rules require that the award be sent to both sides so they get it on the same day. NASD Rule 10330. AWARDS. The three arbitrators signed the award on September 9th, September 10th and September 14th respectively. The NASD official "date of service" on the award is September 29, 1999. Prudential filed a sixteen page Petition to Confirm in Part and Vacate in Part, with exhibits and extensive citations in Newark on September 29, 1999, the NASD "date of service."

9. *Gaghich v. Prudential*, 1997 WL 128269 (W.D.N.Y.).

In the meantime, while Judge Wolin was considering whether to remand the case back to the NASD panel to set a pension dollar amount,[10] Berrafato's counsel learned about Prudential's misrepresentation to the Third Circuit, and filed a Motion to Recall or Modify the Mandate of the Third Circuit (September 18, 2000). The Third Circuit denied the motion without comment (October 27, 2000). Berrafato went bankrupt.

Judge Wolin declined to vacate or modify the "clarified" NASD award. Wolin's opinion is in direct conflict with case law in New York state, and contradicts Judge Seitz's written explanation for arbitral referral. Wolin added that his independent review of the evidence convinced him that the panel committed no manifest abuse in denying Berrafato's counsel fee and defamation claims. Berrafato appealed his memorandum decision.

Berrafato's counsel argued the waiver and contract issues to The Third Circuit panel:

> The Supreme Court of the United States said it best: "Equity will not permit a person to defeat a remedy which except for his misconduct would not be available." *Deitrick v. Greaney*, 309 U. S. 190, 60 S. Ct. 480 (1940). The Supreme Court was not talking about estoppel, but the general principle that wrongdoing should not generate its own reward.
>
> Applicable legal principles do not require this Court to blindly vacate the Berrafato [NASD arbitration] award *in toto*. Rather, since the award is based on a purported contract between Berrafato and PruSec, from which Prudential wrongfully claimed the benefit by lying about their NASD membership, we are not dealing with a question of statutory

10. The panel could not figure out what amount Berrafato was entitled to because Prudential never produced the relevant plan documents, although the ERISA complaint filed in the Northern District of New York in June 1997 requested plan document production as the first item for relief. *See* 29 U.S.C.S. § 1024(b)(4), and 29 U.S.C.S. §§ 1132(a), (c)(1), (g).

> jurisdiction involving Prudential's public policy rights, but only with Prudential's unilateral assertion of private contract rights, viz. the right to the NASD arbitral process derived from the U-4 agreement. Prudential points to no arbitral misconduct or irregularity in this case. Under the circumstances, as no statutory public rights are at issue for Prudential, a finding of waiver is appropriate. Prudential should be bound by the award of full early retirement and full disability benefits, and this Court should so direct.

Then counsel preserved Berrafato's award, as ethics required him to:

> If however, this Court is disinclined to maintain Berrafato's retirement and disability benefits in full, and chooses to adopt a course of reasoning which vacates the [NASD arbitration] award *in toto*, then counsel will abandon the claims and positions stated thus far and confine the argument to an appeal under the Federal Arbitration Act. Counsel deliberately chooses to forego the jurisdictional argument in favor of letting the client's disability and retirement award stand.

The Third Circuit panel totally missed the ethical imperative.[11] They called counsel's statement a waiver, saying there was no precedent allowing them to vacate in part and confirm in part in "piecemeal" fashion, then concluded that the District Court did not err in its review of the NASD panel award. The Third Circuit also said that Prudential's non-

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11. If one believes that the Third Circuit "not precedential" opinion was written by the central legal staff, or a law clerk, as Judge Kozinski candidly admits happens in the 9th Circuit (Kozinski and Reinhardt, "Please Don't Cite This! Why We Don't Allow Citations to Unpublished Opinions, California Lawyer, June, 1999), it is not surprising that a critical ethical issue was missed. Central legal staffs and clerks have no practical experience representing clients.

production of ERISA plan documents need not be sanctioned.[12]

The Third Circuit marked their panel opinion "Not Precedential" under their IOP 5.3; they denied rehearing en banc or by panel.

REASONS FOR GRANTING THE PETITION

1. Prudential should not benefit from misrepresenting their NASD membership; ERISA policy requires fee-shifting analysis; Berrafato's counsel deserves to be paid because he won; Counsel should not forfeit his ERISA fee for putting his client's interests first.

The primary issue in this case involves the interplay between ethics,[13] candor to the tribunal[14] and the integrity of the court.[15]

A. Arbitral review is virtually non-existent despite Gilmer.

Arbitral review is virtually non-existent,[16] despite the

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12. Although ERISA mandates disclosure of plan documents, the sanction provision is discretionary, so the disclosure requirement is frequently ignored, as here. If claimant loses, more likely without plan documents, then he loses. If he wins, as here, no harm, no foul. Either way, a "massive undertaking" of Congress, the "comprehensive remedial scheme" of ERISA gets ignored.

13. "Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living." Rules of Professional Conduct, Preamble.

14. Rule of Professional Conduct 3.3: "A lawyer shall not knowingly: (1) make a false statement of material fact . . . to a tribunal; (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a . . . fraudulent act by the client."

15. *See Itel Containers International Corp. v. Puerto Rico Marine Management, Inc.*, 108 F.R.D. 96 (1985), where the District Court of New Jersey severely punished an attorney and his client when they deliberately concealed lack of diversity jurisdiction, hoping the statute of limitations would run meanwhile.

16. In *Aetna v. Dravo*, 1997 WS 560134 (E.D. Pa.) Judge Brody said her research revealed only two district court cases that vacated

(Cont'd)

promise of *Gilmer v. Interstate/Johnson*, 500 U.S. 20, 32 n.4, 111 S. Ct. 1647, 1655 (1991):

> Gilmer also contends that judicial review of arbitration decisions is too limited. *We have stated, however, that* ***"although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute" at issue (Emphasis added).*** *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 232, 107 S.Ct. 2332, 2340, 96 L.Ed.2d 185 (1987).

The Third Circuit flatly stated that arbitrators have a right to be wrong, citing *Sun Ship v. Matson Navigation*, 785 F.2d 59 (1986) ("Nor can it [the Court] consider whether the arbitrators committed an error of law."). *Sun Ship* has absolutely nothing to do with federal statutory employment rights; it is plainly distinguishable.[17] On this record, the Third Circuit appears to disagree with the Supreme Court, which clearly said in *Gilmer* that arbitrators do not have a right to be wrong where federal policy is concerned.

B. NASD showed "evident partiality"

The Third Circuit misrepresented NASD's "evident partiality." Federal Arbitration Act. 9 U.S.C.S. § 10. Surely they

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(Cont'd)

arbitration awards on the basis that such were made in "manifest disregard of the law." One was reversed on appeal (*Robbin v. Painewebber*, 954 F. 2d 679 (11th Cir. 1992)) while in the other the arbitrator wrote an extensive, revealing opinion (*Mangan v. Owens Truckmen, Inc.*, 715 F. Supp. 436 (E.D.N.Y. 1989). Since her opinion *Halligan v. Piper Jaffray*, 148 F.3d 197 (2d Cir. 1998) was decided (Held, NASD award vacated because any written explanation, if given, would have strained credulity).

17. The concept of a case holding is defined and explained in Aldisert, *Winning on Appeal*, Revised First Edition, National Institute for Trial Advocacy, Sec. 13.3. Labor arbitration cases are readily distinguishable from federal statutory rights cases. Otherwise, the Third Circuit's citation of the "holding" of *Sun Ship v. Matson Navigation* overrules the "holding" of *Gilmer v. Interstate/Johnson*.

recognized NASD's favoritism and Prudential's forum manipulation. Prudential hoodwinked the Third Circuit into sending these cases to NASD arbitration. Indeed, it appears as though the Third Circuit deliberately chose to ignore Prudential's mendacity for fear of having to react to it. Instead, they predictably shot the messenger. Certainly the Berrafato award was procured by fraud or undue means (FAA, § 10(a)(1)) and NASD showed evident partiality to Prudential (FAA, § 10(a)(2)).

The Third Circuit forfeited victorious ERISA counsel's fee[18] rather than analyze the arbitral contract jurisdiction issue. In the Third Circuit arbitration — no matter how slanted, biased or corrupt the arbitration is — is preferred to a judicial review process that protects federal statutory rights. The result in this case punished winning counsel for following the primary rule of lawyering ethics, viz. put the client's interests first. The decision rewarded Prudential for misrepresenting[19] a material fact to the Third Circuit (their NASD membership). The broad scale pragmatic application of this non-review principle makes ERISA a non-functional statute in the Third

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18. The fee and costs are considerable. Counsel (a sole practitioner) spent over 1300 hours and advanced over $45,000 in costs, mostly to pay expert witnesses and for stenographic fees, printing fees and travel and board expenses. The total fee and costs is over $350,000 at present. Counsel was paid slightly less than $5,000.

19. Rule of Professional Conduct 3.3 forbids knowing misrepresentations. Fed. Rule of Civil Procedure 11 says: "By presenting to the court . . . a pleading, written motion, or other paper, an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, — . . . (3) the . . . factual contentions have evidentiary support. . . ." By 1998, surely someone at Prudential (and NASD) knew Prudential was no longer an NASD member. Prudential misrepresented the fact of their NASD membership on February 28, 1997. *Gaghich v. Prudential* (Held, NASD arbitration not available to non-member Prudential) was decided March 10, 1997. The Prudential agent discharge case was argued September 8, 1997 and decided on January 7, 1998; there is nothing in the record that suggests Prudential corrected Judge Seitz's misunderstanding until after the decision came down.

Circuit. The Supreme Court should correct that and bring the Third Circuit into line with national policy. *Cf. Cole v. Burns*, 105 F.3d 1465, 323 U.S. App. D.C. 133 (1997) (Held, former employer could not require employee to pay all or part of arbitrator's fees; and arbitrator's rulings on employee's statutory claims would be subject to meaningful judicial review).

C. Where a judgment is tainted by fraud the fraudulent part should be vacated.

Where a judgment is tainted by fraud, it should be vacated. Here the jurisdictional misrepresentation taints the Berrafato award. Portions of it should be set aside to protect the integrity of the judicial system. *Root Refining v. Universal Products*, 169 F.2d 514 (3d Cir. 1948) (Judge J. Warren Davis took a bribe; the judgment was set aside because tainted by fraud); *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 239, 64 S. Ct. 997, 998, 88 L. Ed. 1250 (1944) (movant seeking to set aside allegedly fraudulent judgment was party to prior litigation in which the judgment was entered), *overruled on other grounds*, *Standard Oil Co. v. United States*, 429 U.S. 17, 97 S. Ct. 31, 50 L. Ed. 2d 21 (1976).

This Court has a multitude of reasons to exercise their supervisory powers to redeem the integrity of our Courts and to correct the absurd result that happened in this case.

D. The Ethical Conflict: ethics forbid counsel from arguing the "all or nothing" jurisdictional defect, because its success would lose the client's benefits.

The most compelling argument in this case is that the entire NASD panel award should be vacated because the panel lacked "jurisdiction."

Prudential was not a member of NASD when Berrafato was fired (January 7, 1997), so the matter should have been tried in the Northern District of New York (Syracuse), where the lawsuit was filed. Case law supports Berrafato. On March 10, 1997, a New York District Court (Western District) handed down *Gaghich v. Prudential*, 1997 WL 128269 (WDNY) holding that Prudential could not compel NASD arbitration of

an ADEA case when the discharge occurred after Prudential resigned from NASD (May, 1996).

Had Berrafato's counsel advanced the all or nothing jurisdictional argument, Berrafato's benefits ($4300/month, life insurance, health care, spousal annuity) could have been lost. Ethics require a lawyer to put his client's interests above all else. Rules of Professional Conduct-*Preamble: A Lawyer's Responsibilities*. The all or nothing jurisdictional argument puts client Berrafato's award at risk. It is clearly unethical and it would have been wrong to advance it.

E. The Third Circuit could have vacated part of the award; arbitration awards are not an "all of nothing" issue.

The Third Circuit could have vacated part of the award. Any portion of an arbitrator's award which is beyond his commission, or beyond what the parties agreed to, may be vacated, because it is outside the arbitrator's "jurisdiction" or power to render an award. *See Mastruobono v. Shearson*, 514 U.S. 52, 115 S. Ct. 1212 (1995) (Held, portion of award denying punitive damages vacated, because contract between broker and customer applied NASD rules, which permit punitive damages award). One of the oldest arbitration decisions in the Third Circuit (opinion written by Becker, J., now Chief Judge), *Swift Industries v. Botany Industries*, 466 F.2d 1125 (3d Cir. 1972), holds that the parties' agreement did not give the arbitrator power[20] to impose a bond requirement as a remedy; the Court vacated the bond remedy portion of the award. In Berrafato, even Prudential recognized the severability of arbitration awards. They originally filed a Petition to Confirm in part and Vacate in part (later amended to a Petition to confirm).

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20. If "jurisdiction" is the power of a court to enter an effective order, why isn't "contract jurisdiction" synonymous with the parameters of an arbitrator's power to make an effective award, i.e. within the scope of his commission, as set forth in the arbitration agreement (or implied therefrom, *see C and L Enterprises v. Citizen Band Potowatomi Indian Tribe*, 532 U.S. 411, 121 S. Ct. 1589 (2001)?

The issue in vacating part of an award is semantical, not legal. "Jurisdiction" is a word with twenty-five different meanings, according to Black's Law Dictionary (West Group Pocket Ed. 1996), some of them are quite different from others. One of them is "contract jurisdiction: jurisdiction that parties have agreed to, either by agreement, by contract, or by general appearance." Contract jurisdiction is far different from diversity jurisdiction, for example. Diversity jurisdiction is founded on a Constitutional principle tracing its roots to a basic principle designed to preserve fair play within federalism. Parties may not change it by agreement. Contract jurisdiction is entirely within the control of the parties. *Volt Information Sciences v. Bd. of Trustees*, 489 U.S. 468, 109 S. Ct. 1248 (1989). The parties are totally free to agree to a limited set of issues, prescribe damages parameters, venue, and who will be the arbitrator(s). Contract jurisdiction is synonymous with the power of the arbitration panel to do what it did, and it is conferred by the parties.

If an arbitrator exceeds the scope of his charge, a Court may always (and should) vacate in part and confirm in part. Arbitral review is never an all or nothing matter. The real questions are: (1) what did the parties agree to, by written contract, by other agreement, or by general appearance and (2) did the arbitrator go beyond the scope of that actual or implied agreement? The Third Circuit never addressed the contract basis of arbitral jurisdiction. They should have.

1. The ERISA Policy Analysis

Federal policy in Congressional legislation may preclude the arbitral forum from making awards which conflict with that Federal policy. For example, in *Hoffman Plastics v. NLRB*, 152 L. Ed. 2d 271, 122 S. Ct. 1275 (2002), the award reinstated an illegal alien, and this Court reversed, holding that the Federal policy against employing illegal aliens embodied in the Immigration Reform and Control Act of 1996 (IRCA) limited NLRB power. The Supreme Court cited the *Southern S.S. Co.*[21]

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21. *Southern S. S. Co. v. NLRB*, 316 U.S. 31, 62 S. Ct. 886, 86 L. Ed. 1246.

line of cases: "where the (NLRB) Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may have to yield." *Hoffman Plastic Compounds v. NLRB*, *supra*, at page 1277.

On the other hand, in Berrafato the Third Circuit cited *Sun Ship v. Matson Navigation*, 785 F.2d 59, at 62 (3d Cir. 1986): "Nor can it [the Court] consider whether the arbitrators committed an error of law." The Third Circuit cited *U.S. Steel & Carnegie Pension Fund v. McSkimming*, 759 F.2d 270-271 (3d Cir. 1985) for the proposition that an arbitrator's award must be upheld unless there is a manifest disregard of the law of the shop (or the collective bargaining agreement). The Third Circuit equates ERISA with the law of the shop, which is patently incorrect.

Confounding all of this, Third Circuit precedent says where an arbitration award violates well-defined dominant public policy then the award should be set aside. *National Association of Letter Carriers v. United States Postal Service*, 2001 WL 1496502 (3d Cir.). The Berrafato decision is aberrant; it cannot be reconciled with *National Association of Letter Carriers v. United States Postal Service*, 2001 WL 1496502 (3d Cir.).

The Berrafato case involves Federal pension, health care and disability plan benefit rights, which are created and protected by a comprehensive, preemptive remedial scheme passed by Congress and signed into law by the President. *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 107 S. Ct. 1549 (1987) (Held, ERISA is a comprehensive remedial federal scheme which preempts state causes of action to effect coherent, unified national policy). ERISA is much more than the law of the shop. It is a well-defined, dominant national policy. This Court has called it "a massive undertaking." *Pilot Life v. Dedeaux*, 481 U.S. 41 at 45. The Court said: "The House and Senate sponsors emphasized both the breadth and importance of the preemption provisions." *Pilot Life v. Dedeaux*, 481 U.S. 41 at 46. Logically, ERISA should compel supreme vigilance on the part of the judiciary because it affects all employed people. Enforcing the

private sector's obligation to live up to its retirement and health care obligations unburdens federal and local treasuries (ERISA theoretically saves tax dollars, although its effectiveness is significantly reduced by spotty, idiosyncratic enforcement[22]).

ERISA is clear:

> It is hereby declared to be the policy of this chapter to protect . . . the interests of participants in employee benefit plans and their beneficiaries, by establishing standards of conduct . . . , and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C.A. § 1001.

"Ready access to the Federal courts" requires the assistance of competent counsel, who cannot work for free and long survive. Congress enacted ERISA's enforcement provisions "to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement . . . for recovery of benefits due to participants." H.R. Rep. No. 533, 93d Cong., 1st Sess. 17 (1973), reprinted in 1974 U.S. Code Cong. & Ad. News 4639, 4655. Claimants in statutory rights proceedings act as "private attorney[s] general . . . vindicating a policy that Congress considered of the highest priority. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416 (1978); *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968)." ERISA contains a fee shifting provision which has been held discretionary in the Third Circuit, as long as a five factor test is applied. *Ellison v. Shenango Pension Board*, 956 F.2d 1268 (1992).[23]

22. This case is an example: you get one "jurisdictional" result in New York (*Gaghich* and *Burns* cases), and a different result in New Jersey (Berrafato), even though the case originated in New York. The matter of plan document production is just as dramatically disparate: in Ohio plan administrators who withhold plan documents get fined **personally** (*Bova v. American Cyanamid*, 662 F. Supp. 483 (S.D. Ohio); in the Third Circuit, nothing happens. So much for the "comprehensive federal remedial scheme" of ERISA.

23. The Civil Rights statutes contain discretionary language fee shifting provisions nearly identical to ERISA's. 42 U.S.C.A. § 2000e-

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The prevailing claimant is not supposed to use his overdue benefits to pay his fees:[24]

> Ellison's [prevailing party] ability to pay is irrelevant to the court's inquiry into the propriety of requiring an offending party to pay a prevailing party's attorney's fees and contradicts the statutory purpose of ERISA to protect pension benefits. . . . It is incorrect to consider the lump sum Ellison belatedly received as a result of successful litigation as a source of funds out of which he can pay his attorney's fees.

Ellison v. Shenango Pension Board, 956 F.2d 1268, 1277 (3d Cir. 1992).

The Third Circuit has conflicting rules on ERISA fee shifting. If the case is tried in court, then fees may be shifted under the *Ursic* doctrine because *Ursic* is controlling precedent which sets the rules for fee shifting. However, if an arbitrator (or panel) ignores *Ursic*, his decision goes unreviewed, and ERISA loses its meaning. This is hardly the "comprehensive remedial scheme" enacted by Congress and envisioned by Justice White when he wrote that federal review of arbitral process was "sufficient to ensure that arbitrators comply with the requirements of the [federal] statute." *Gilmer v. Interstate/ Johnson*, 500 U.S. 20, 111 S. Ct. 1647 (1991). Do our District Courts and Courts of Appeal have the constitutional right under Article III to vacate Congressional policy by knowingly referring cases to biased arbitral process, where "jurisdiction" was procured by fraud, then ignore clear arbitral disregard of the

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5(d); 42 U.S.C.A. § 2000a-3(b), 42 U.S.C.A. § 1988. The Supreme Court said that fees should be awarded to prevailing parties under the Civil Rights statutes absent "special circumstances." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, at 415, 95 S. Ct. 2362, at 2370, 45 L. Ed. 2d 280 (1975) (Title VII case).

24. In Berrafato Prudential recognized this point of law, because they paid all of the overdue benefits directly to Berrafato, bypassing counsel, except for slightly less than $5,000, which they mistakenly sent to counsel.

law? In this day of massive corporate fraud which wipes out employees' pension funds to enrich executives (Enron), the courts should emphasize the justice system's obligation to effect ERISA policy. At what point does the federal court's right to decline arbitral review collide with its constitutional (Article III) obligation to enforce Congressional legislative blueprints?

If federal immigration policy is beyond the competence of the NLRB (*Hoffman Plastic Compounds v. NLRB*, *supra*), a legitimate federal agency, how is it that national pension and healthcare policy is within the competence of fatally defective securities dealers' arbitration? *Hoffman Plastic Compounds*, *supra*, should be applied to this case in deference to the primacy of Congressional policy. The Berrafato decision should be vacated with directions.

2. Contract Law Analysis

NASD arbitral jurisdiction is contract jurisdiction.[25] *Volt Information Sciences v. Bd. of Trustees*, 489 U.S. 468, 109 S. Ct. 1248 (1989). If the contested portion of the award is beyond the scope of what the contract provides the arbitrator may do, it should be vacated.

Here, obviously the NASD panel was never empowered to hear this case, because their jurisdiction was founded on a false factual predicate, viz. non-existent NASD membership. However, both Prudential and Berrafato have clearly accepted that portion of the award which gave Berrafato his benefits, so that portion of the award is agreed to by both sides and should stand.

3. Estoppel or Waiver Analysis

Perhaps a better way to deal with this issue is by applying the doctrine of waiver or estoppel, viz. Prudential waived its right to object to unfavorable portions of the award on jurisdictional grounds because Prudential is the author of the jurisdictional defect. Prudential created the problem; they should

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25. In *In re the Prudential Insurance Company of America Sales Practice Litigation All Agent Cases*, 133 F.3d 225 (1998), Judge Seitz continually referred to NASD arbitral jurisdiction as contract jurisdiction.

not benefit from it. *Deitrick v. Greaney*, 309 U.S. 190, 60 S. Ct. 480 (1940) (Held, bank executive who substituted note to conceal unlawful purchase of bank stock, cannot avoid repayment by relying on secret agreement not to enforce note). This Court has held that where an Indian tribe agrees to arbitrate a commercial dispute, the Indian tribe waives the sovereign immunity defense which was available absent the agreement to arbitrate. *C and L Enterprises v. Citizen Band Potowatomi Indian Tribe*, 532 U.S. 411, 121 S. Ct. 1589 (2001). Other defenses are not affected; the tribe was free to litigate all other traditional contract breach issues. Prudential should be deemed to waive the defense of lack of NASD arbitral jurisdiction. *C and L Enterprises v. Citizen Band Potowatomi Indian Tribe*, 532 U.S. 411, 121 S. Ct. 1589 (2001) easily applies. The waiver argument has the added attraction of two well reasoned Supreme Court cases as precedent, one of long standing, as befits its moral weight (*Deitrick v. Greaney*, *supra*) and the other much more recent *C and L Enterprises v. Citizen Band Potowatomi Indian Tribe*, *supra*).

4. The Conflict in Decisions

The rules appear to be as follows:

1. Federal arbitration [procedural] policy trumps state substantive law (*Mastrobuono*), unless the parties expressly agree otherwise (*Volt v. Bd. Of Trustees*) or impliedly agree otherwise *C and L Enterprises v. Citizens Band Potowatomi Indian Tribe*);

2. Federal [substantive] policy trumps Federal arbitral [procedural] policy (*Hoffman Plastics v. NLRB*) where the Federal substantive policy is the subject of remedial legislation.

3. ERISA is a comprehensive federal statute with a clearly defined policy encouraging access to the Federal Courts and a total, exclusive remedial scheme (*Pilot Life Insurance v. Dedeaux*, 481 U.S. 41, 107 S. Ct. 1549 (1987); it preempts State substantive law, especially where remedies are at issue (*Pilot Life v. Dedeaux; Rush Prudential HMO v. Moran*, 122 S. Ct. 2151 (2002).

4. FAA Review of arbitral decisions [procedural matter], although limited, is sufficient to safeguard federal statutory [substantive] policy rights enacted by Congress (*Gilmer v. Interstate/Johnson*, 500 U.S. 20, 111 S. Ct. 1647 (1991).

Faced with the choice between enforcing *Gilmer* (arbitral review is sufficient to safeguard federal statutory rights) and quoting *Sun Ship* (arbitrators have a right to be wrong about everything), the Third Circuit opted against *Gilmer*. But one court took *Gilmer* seriously once. *Halligan v. Piper Jaffray*, 148 F.3d 197 (2d Cir. 1998) (Held, where reviewing court is inclined to find that arbitrators manifestly disregarded law or evidence and that an explanation of arbitrators' reasoning, if given, would have strained credulity, the absence of explanation reinforces the reviewing court's confidence that the arbitrators engaged in manifest disregard). Industry self-regulating organizations are not held in high regard everywhere. *See Rosenberg v. Merrill Lynch*, 148 F.3d 197 (1998) (Held, stock exchange arbitration is too flawed a process to afford a female claimant fair trial), vacated but decision affirmed on other grounds, 170 F.3d 1 (1st Cir. 1999) (result affirmed because employer did not properly explain arbitration to employee when she signed the U-4 agreement form, therefore no knowing waiver of right to trial[26]). *Rosenberg v. Merrill Lynch*, 170 F.3d 1 (1st Cir. 1999).

The Berrafato decision stands for the proposition that in the Third Circuit jurisdictionally bereft NASD arbitrators may ignore ERISA law where a major corporation wants to shuck its benefits obligations to thousands of discharged employees.

Obviously, the Berrafato decision is irreconcilable with the holding in *Hoffman Plastic Compounds v. NLRB*, *supra*, and all of the other relevant cases. Equally obviously, the Berrafato decision runs afoul of the Congressional mandate in ERISA.

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26. Berrafato signed his U-4 long after he was first employed by Prudential. Nobody explained ERISA to him; besides, if he had not signed, he probably would have lost his job.

F. Judge Wolin had no authority to "review" the evidence

Berrafato prevailed convincingly on the merits. The panel unanimously[27] found that his benefits denial was "arbitrary and capricious."[28] The NASD panel ignored the *Chambless v. Masters, Mates and Pilots*, 815 F.2d 869 (2d Cir. 1987) and *Ursic v. Bethlehem Mines*, 719 F.2d 670 (3d Cir. 1983) fee shifting test[29] although Prudential quoted the *Chambless*[30] five part test to them in a brief. Obviously, Berrafato satisfied the five part test, and his fees and costs should have been shifted to Prudential. Judge Wolin slid by the panel's manifest disregard of the fee-shifting mandate by stating that his review of the evidence showed that the case could have gone either way. Judge Wolin is not empowered to review evidence. He must accept the factual version of the verdict winner (Berrafato) and all reasonable inferences therefrom. He does not have the power to re-visit evidence and weigh it anew. *Paperworkers v. Misco*,

27. Later, after the plan documents were produced, it was obvious that Berrafato qualified as a "retired participant" under the language of the Pru plan, and should get his full benefits. The panel chairman changed his mind to favor Prudential. The lay arbitrators voted for Berrafato's benefits.

28. Translation: No two reasonable people could disagree about Prudential's wrongdoing.

29. (1) The offending party's culpability or bad faith (the panel found Prudential's denial of benefits was "arbitrary and capricious"), (2) the ability of the offending party to satisfy a fee award (Prudential is a multibillion dollar company; Berrafato went bankrupt), (3) the deterrent effect of a counsel fee award (hopefully Prudential will learn something), (4) the benefit conferred on the members of the pension plan as a whole (if publicized-the judiciary controls this factor, not Berrafato), (5) the relative merits of the parties position (Berrafato won convincingly).

30. Since we tried the case in New York, Pru's attorneys used the Second Circuit case, *Chambless v. Masters, Mates and Pilots*, rather than the Third Circuit case, *Ellison v. Shenango Pension Board* for the five part test quotation. Both cases recite the same test, although Ellison refers to other circuits (Fourth, Eighth and Ninth) where fee shifting is presumed absent compelling circumstances to the contrary. *See Ellison v. Shenango Pension Board*, 956 F.2d 1268, 1274 (1992).

484 U.S. 29, 108 S. Ct. 364 (1987). The Third Circuit said the District Court "carefully evaluated" the five factors, which is clearly untrue. There was no analysis or explanation whatsoever. Judge Wolin simply listed the five factors, then said that his review of the evidence convinced him that the case could have gone either way, so the internally inconsistent award was affirmed.

G. NASD and judicial pro-Prudential Bias

More disturbing than Judge Wolin's disingenuous review of the evidence is how the case got to Judge Wolin.

Ordinarily, an FAA appeal goes to the District Court in the district where the award was made. However, venue is permissive. *See Cortez Byrd Chips v. Bill Harbert Construction Co.*, 529 U.S. 193, 120 S. Ct. 1331 (2000) . This case was tried in Buffalo and appealed to New Jersey, Prudential's home state.[31] The FAA appeal ordinarily would have gone to the Western District of New York, where there is clear precedent against Prudential.[32] The only way Prudential could win on appeal was to keep the case out of New York and get it back into New Jersey. NASD gave Prudential the award before they gave it to Berrafato, so Prudential had ample time to prepare a comprehensive Petition to Confirm in Part and Vacate in Part. NASD made certain that Prudential's FAA filing would preempt

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31. Considering the peripatetic nature of this case, and the way Prudential and NASD conspired to keep the appellate portion in Newark, New Jersey one wonders about the wisdom of *Cortez Byrd Chips*, *supra*. All Syracuse witnesses had to come to Buffalo, and some had to be boarded. Counsel has to be admitted *pro hac vice*, and pay local counsel to file documents. Out-of-work people cannot afford this kind of multi-state, peripatetic litigation unless fee-shifting precedents are followed.

32. *Gaghich v. Prudential*, 1997 WL 128269 (W.D.N.Y.) (Held, Prudential's motion to remand former employee's ADEA claim to NASD arbitration denied because employer Prudential is not a member of NASD, even though employee signed U-4 and Prudential securities subsidiary, PRUCO, is NASD member); *Burns v. New York Life*, 1999 WL 101773 (S.D.N.Y.) (Held, New York Life's request to remand former employee's Title VII claim to NASD arbitration denied because New York Life-employer-was not NASD member).

Berrafato's. Review by Judge Wolin and the Third Circuit was thereby assured.[33]

NASD certainly knew that Prudential was not an NASD member, and therefore not entitled to arbitrate, but they wanted the fees from Prudential's discharge cases. NASD concealed that information from Berrafato throughout the proceedings. At the end they gave Prudential the advantage of a favorable review forum.[34]

Berrafato's process was simply unfair; NASD, the NASD panel chairman, Judge Wolin and the Third Circuit favored Prudential throughout.[35] In the face of all of the above, the

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33. Judge Wolin's pro-Prudential bias was well documented by Michael Malakoff, Esquire, in his brief in *In Re: Prudential Insurance Company America Sales Practice Litigation agent actions, Krell v. Prudential Insurance Company of America*, (Third Cir. Nos. 97-5155, 97-5156 and 97-5312). Malakoff sought statewide class actions rather than a national class action suit, because insurance law is state law; the national law of insurance is that state law is dominant. McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.* However, Prudential wanted to dispose of all claims in a single, sweeping national case to keep their restitution payments down. Prudential won that issue before Judge Wolin and the Third Circuit.

34. During the Prudential Sales Practices litigation Judge Wolin met privately with Prudential's Chairman Arthur Ryan; Judge Wolin was accused of holding *ex parte* conferences with Prudential's counsel; Judge Wolin was willing to talk about agents' counsel *ex parte* with a Pennsylvania Judge presiding over an agent discharge case (the Pennsylvania Judge declined); Wolin denied discovery into a $2 million fee payment to a fictitious law firm; in Berrafato the issue of whether to remand the Sept. 29, 1999 award back to the panel to fix a dollar amount came up at a conference between Judge Wolin and Prudential counsel which Berrafato's attorney was unaware of. Berrafato was invited to submit a letter brief. Judge Wolin remanded the case back to NASD, as Prudential requested, giving Prudential a second opportunity to reduce Berrafato's benefits.

35 The NASD panel chairman, or NASD administrative personnel erased a portion of the hearing tapes (NASD Rule 10326); the chairman held evidentiary ruling conferences alone, whereas NASD rules require

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Third Circuit summarily concluded there was no "evident partiality" under 9 U.S.C.A. § 10(a)(2), even when confronted with NASD's complicity with Prudential to assure New Jersey and Third Circuit FAA review. The promise of *Gilmer v. Interstate/Johnson*, 500 U.S. 20, 111 S. Ct. 1647 (1991), viz. review "sufficient to ensure that arbitrators comply with the requirements of the statute" remains unfulfilled.

H. Candor and publicity.

Candor to the tribunal is mandatory. Appellate counsel may be required to advise whether the appeal is frivolous. *McCoy v. Wisconsin*, 486 U.S. 429, 108 S. Ct. 1895 (1988). When a case becomes moot, counsel is obligated to so inform the court immediately. *Arizonans for English v. Arizona*, 520 U.S. 43, 117 S. Ct. 1055 (1997) citing *Tiverton v. Pastore*, 469 U.S. 238, 105 S. Ct. 685 (1985) (Burger, C.J.: counsel has duty to promptly inform the court of any significant change in the law at all stages of the proceedings).

But what is the Court's obligation to litigants when it learns of a significant process defect (lack of contract jurisdiction) affecting federal statutory rights (ERISA)? The court should be outraged by the affront to its integrity, and proceed accordingly. *See Itel Containers v. Puerto Rico Marine Management*, 108 F.R.D. 96 (1985) (Held, jurisdictionally defective case dismissed; defense counsel severely sanctioned for concealing lack of diversity jurisdiction).

Here, Berrafato's counsel brought the jurisdictional defect issue to the attention of the Third Circuit as soon as he learned about it and verified it. The Third Circuit denied Berrafato's motion to recall or amend the mandate. One can defend the mandate recall denial by arguing that when the motion to recall the mandate was filed there was no ripe controversy, only a

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all three arbitrators to participate and decide (NASD Rule 10325); the chairman excluded the Gillen Memo, which conclusively proved that field staff discharges were a cost-cutting measure that emanated from Chairman Arthur Ryan; finally, at the end, the NASD chairman inexplicably reversed himself.

case making its way through the lower court review process. However, when the jurisdictional misrepresentation issue was squarely presented to the Third Circuit on appeal, their decision ducked the ethical and *Deitrick v. Greaney* issues and the arbitral contract jurisdiction issue. This case was about as unfair as civil cases ever get. The Third Circuit memorialized its significance by consigning it to what William Hangley calls the "B" pile of cases, i.e. those which may not be published, or may not be cited, or both. *See* Hangley, *Opinions Hidden, Citations Forbidden: Report And Recommendations Of the American College of Trial Lawyers On The Publication And Citation Of Nonbinding Federal Circuit Court Opinions*, 208 F.R.D. 645 (2002), probably the most comprehensive and insightful analysis of the noncitation/nonpublication rules among the circuits.

2. "Not precedential" opinions are unconstitutional

A. The "judicial power" requires law (judges) to remedy the violation of a vested legal right.

Article III vests the "judicial power" in the Supreme Court and inferior courts.

"Judicial power" was defined in *Marbury v. Madison*, 5 U.S. 137, 163, 2 L. Ed. 60 (1803): "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." And again: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."

B. The Supreme Court recognizes that precedents are presumptively correct and have value to the legal community as a whole.

Third Circuit IOP 5.3 is contrary to this Court's sentiment about the importance of judicial decisions.

The Supreme Court said there is a significant public interest in judicial decisions, even decisions which are mooted by settlement. In *U.S. Bancorp v. Bonner Mall*, 513 U.S. 18, 115 S. Ct. 386 (1994), Justice Scalia wrote for a unanimous Court:

> As always when federal courts contemplate equitable relief, our holding must also take account of the public interest. "Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur. *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S.* *27 *Philips Corp.*, 510 U.S. 27, 40, 114 S. Ct. 425, 428, 126 L. Ed. 2d 396 (1993) (Stevens, J., dissenting).

Marking the case "not precedential" abdicates the judicial function, which is to write an opinion which clearly and convincingly integrates a decision into the evolving body of common law in a manner congruent with valid, binding and acceptable rules (in this case, ERISA policy and *Ursic v. Bethlehem Mines*, *supra*).

In *The Judicial Process: text, materials, and cases* (2d ed. 1996, West Publishing Co.) Judge Aldisert wrote at pages 607-608:

> The decision that emanates from the opinion, . . . , is used to inform, guide and govern future private and public transactions. This future use of the decision is absolutely necessary if we accept Holmes's definition that law is nothing more pretentious than a prediction of what the courts will do in fact. Thus perceived, a quality opinion will predict how similar factual scenarios will be treated. . . . [continuing on pages 612 and 613] The public explanation for the decision is the public's insurance policy against decision by judicial fiat. As Justice Frankfurter once observed, a court is "not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency. . . .
>
> Public expression of judicial reasoning is a necessary concomitant of what is generally conceded to be the dual function of any appellate court–settling

> the dispute between the parties and institutionalizing the law. . . . The review process may also serve as a vehicle for stating and applying constitutional principles, for authoritatively interpreting statutes, for formulating and expressing policy on legal issues, for developing the common law, and for supervising the levels of the judicial hierarchy below the appellate courts. This set of tasks is called the institutional function of the court.

The single most important sentence in the foregoing quotation is: "The public[36] explanation for the decision is the public's insurance policy against decision by judicial fiat." Like cases should have a like result. Public explanation is synonymous with judicial accountability.

C. The American College of Trial Lawyers recommends that all decisions be published as precedent because the present system is confusing, inconsistent, illogical and ignores reality; publication is the best rule.

The American College of Trial Lawyers published a report criticizing non-publication, non-citation rules as confusing, illogical, inconsistent and unrealistic. *See* Hangley, *Opinions Hidden, Citations Forbidden: Report And Recommendations Of the American College of Trial Lawyers On The Publication And Citation Of Nonbinding Federal Circuit Court Opinions*, 208 F.R.D. 645 (2002). After reviewing the rules, Hangley points out that they are extremely difficult to negotiate, totally out

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36 Justice Brandeis said: "sunlight is said to be the best of disinfectants; electric light the most efficient policeman." Sir Edwin Coke: "The law is unknown to him that knoweth no the reason therefor, and the known certainty of the law is the safety of all." William Hangley: "Telling the public that 1,500 cases have been decided, but letting them know the "reason therefor" in only 300 of those cases, is not a wise policy." Hangley, *Opinions Hidden, Citations Forbidden: Report And Recommendations Of The American College Of Trial Lawyer On The Publication And Citation Of Nonbinding Federal Circuit Court Opinions*, 208 F.R.D. 645 (2002).

of touch with reality, and may be unethical. For example, unpublished decisions are precedent in fact, if not in name: institutional litigants use them to shape strategy, before and after the lawsuit begins. Where a rule allows publication on request within a certain time, institutional clients have an unfair advantage; they can influence the selection of precedent by requesting that favorable decisions be published. Giving advice to clients without informing them about unpublished decisions may be unethical; lawyers are supposed to communicate fully and candidly. Non-citation rules can always be skirted by quoting language from stealth opinions; judges will remember what they said. Hangley's criticisms are pragmatic and his points are well-documented.

Judges say they are inundated, and need a quick way to dispose of run-of-the-mill cases. No one ever said judging was easy business, and certainly appellate volume has increased. But in today's world most people are working longer, harder and more productively than ever. It is incumbent upon the court system to find, test, and then implement consistent, better ways to improve the quality of its product and service. Secrecy is not the answer.

Our judicial literature contains a spirited but ginger[37] debate between proponents of published opinions — the common law argument[38] — and proponents of "not precedential" or unpublished opinions.[39] The Supreme Court should address this issue and give guidance, because the number of unpublished cases has risen rapidly since the "not precedent" rules were first promulgated. Now, in some circuits only about fifteen percent of all opinions are published. Kozinski and Reinhardt, *Please*

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37 Trial lawyers are understandably reluctant to criticize judicial decisions and work product.

38 *Anastasoff v. United States of America*, 228 F.3d 898 (8th Cir. 2000). Vacated as moot after rehearing en banc. *See Anastasoff v. United States of America*, 235 F.3d 1054 (8th Cir. 2000).

39 *See Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001) (upholding the constitutionality under Article III of Ninth Circuit Rule 36- 3, which states that "[u]npublished dispositions . . . are not binding precedent").

Don't Cite This! Why We Don't Allow Citation To Unpublished Dispositions, California Lawyer (June, 1999).[40]

Most authorities recognize that decisional reasoning must be written down and publicized to protect the integrity of the body of law.

George Nicolau severely criticized the secrecy aspect of NASD arbitration process and questioned its constitutionality in arbitrating statutory employment or discrimination claims. Nicolau, *Gilmer v. Interstate/Johnson Lane Corp.: Its Ramifications and Implications for Employees, Employers and Practitioners*, 1 Univ. of Penna. Journal of Labor and employment Law 177 (1998). *Halligan v. Piper Jaffray*, 148 F.3d 197 (1998) vacated an NASD award on merits because NASD offered no written explanation. Judge Gertner did a comprehensive review of stock exchange arbitration process and castigated it. *Rosenberg v. Merrill Lynch*, 148 F.3d 197 (1998).

Even NASD changed two of its rules in response to authoritative criticism. In 1999 and 2000 NASD changed their process in statutory rights cases to: (1) allow claimants to opt out of arbitration; and (2) required written arbitral explanations of statutory rights decisions. All the same, The Arbitrator's Manual said then and says now:

> *Arbitrators are not strictly bound by case precedent or statutory law.* Rather they are guided in their

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40 Judges Kozinski and Reinhardt candidly admit that: "Most [memdispos, i.e. unpublished, uncite-able dispositions] are drafted by law clerks with relatively few edits from the judges. Fully 40 percent of our memdispos are in screening cases, which are prepared by our central staff . . ." They go on to say that the judges "make sure the result is correct." The American College of Trial Lawyers report notes disagreement with Kozinski and Reinhardt: "Some commentators would disagree sharply with an assertion that the non-circuit binding opinions are reached on the same basis as binding, reporter published ones: "[W]e discovered that outcomes among unpublished opinions showed significant associations with political party affiliation, specific professional experiences, and other characteristics of judges adjudicating the cases." Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 Vand. L. Rev. 71, 119 (2001).]

> analysis by the underlying policies of the law *and are given wide latitude in their interpretation of legal concepts.* On the other hand, if an arbitrator manifestly disregards the law, an award may be vacated. (Emphasis supplied) NASD, The Arbitrator's Manual (updated 3/21/01).

One supposes that if an arbitrator is required to explain in a public writing why he chooses not to follow the law, he will follow the law; or at least, future litigants will know to strike him, so that he will only follow his own muse once.[41] Public explanation regulates and improves performance. When pro-industry organizations like NASD go public, it is time for the judicial system to re-think its "opinions hidden, citation forbidden" policies.

Belated self-remediation by NASD does nothing for Prudential employees discharged between May, 1996 and January of 2000. The NASD Arbitrator's Manual still tells arbitrators that they need not follow the law. Amending NASD rules did not change the ERISA avoidance blueprint so evident in Berrafato. Litigants can only appeal in the hope that judicial review will treat them consistently with precedential decisions. *Gilmer v. Interstate/Johnson*, *supra*, promises adequate review, but so far has not delivered.

Judge Aldisert's writings contain numerous references to the need for public explanation. Obviously, many in the legal world are troubled by the problem. The Supreme Court unanimously thought they were a bad idea. *See U.S. Bancorp v. Bonner Mall*, 513 U.S. 18, 115 S. Ct. 386 (1994).[42] Publishing all decisions as precedent does not mean the judicial work product in each case needs to be lengthy with exhaustive citations, or explore all the nuances of the issue. The written decision need only deal with the core issues in the case, and talk about them simply. Later on, refinements will occur when and if the decision is cited. In fact,

41. In Berrafato, Prudential struck the first NASD arbitration chairman; he had a stint as a prosecutor in his background.

42. It should go without saying that a vacated decision is a not precedential decision.

simple is frequently better. What is important is to avoid secrecy and the appearance of secrecy.[43] Bentham recognized the problem centuries ago in the context of public trials:

> Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance. *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499) (1948) (Held, state statute authorizing one man grand jury-judge to hold witness in contempt in secret proceeding unconstitutional).

It is important for the public to respect the judiciary, not feel that something is being concealed. With published opinions, the law will develop in a public, orderly, acceptable way, minimizing and correcting its errors as it goes. It has done so for hundreds of years and there is no reason to think that will change.

CONCLUSION

Wherefore, petitioner respectfully requests this Court to issue a writ of certiorari to the Court of Appeals for the Third Circuit.

Respectfully submitted,

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43. Daniel Patrick Moynihan wrote a book about how a culture of secrecy produces poor decisions. Spirited public discussion produces intelligent, well accepted decisions. *See* Moynihan, *Secrecy*, Yale University Press (1999).

APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED OCTOBER 1, 2002

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-2320

IN RE: PRUDENTIAL INSURANCE COMPANY OF AMERICA SALES PRACTICE LITIGATION

Paul J. Berrafato,
Appellant

(D.C. Civ. Nos. 99-cv-04641 & 97-cv-05044)

SUR PETITION FOR REHEARING

Present: BECKER, *Chief Judge*,
SLOVITER, SCIRICA, NYGAARD, ALITO,
ROTH, McKEE, AMBRO and FUENTES, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

Appendix A

BY THE COURT,

s/ [illegible]
Circuit Judge

Dated: OCT 01 2001

APPENDIX B — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED SEPTEMBER 3, 2002

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-2320

IN RE: PRUDENTIAL INSURANCE COMPANY OF AMERICA SALES PRACTICE LITIGATION

Paul J. Berrafato,
Appellant

On Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action Nos. 99-cv-04641 & 97-cv-05044
(Honorable Alfred M. Wolin)

Submitted Pursuant to Third Circuit LAR 34.1(a)
July 15, 2002

Before: SCIRICA, ALITO and FUENTES, *Circuit Judges*

(Filed September 3, 2002)

OPINION OF THE COURT

SCIRICA, *Circuit Judge*.

Paul Berrafato appeals from the District Court's judgment upholding his arbitration award. We will affirm.

Appendix B

I.

Berrafato was employed by Prudential as an insurance sales representative in 1965. He was later appointed general manager of a district office, and held that at-will position until January 6, 1997. Berrafato was fired in connection with allegations that he concealed video tapes from regulatory compliance inspectors, made misrepresentations, and refused to answer deposition questions about document destruction in a Prudential Sales Practices Litigation matter. Berrafato brought suit against Prudential claiming he was entitled to disability and retirement benefits. Prudential responded that Berrafato was disqualified from receiving these benefits because he had been terminated for "egregious misconduct."

Prudential moved to compel arbitration under the rules of the National Association of Securities Dealers ("NASD"). Berrafato was registered with the NASD, met the definition of an "associated person" under the NASD code, and had signed a Form U-4 Uniform Application for Securities Industry Registration or Transfer ("Form U-4") providing for the arbitration of disputes. On March 10, 1998, the District Court ordered Berrafato to arbitrate his claims before the NASD.

On November 2, 2000, the NASD arbitration panel rendered its decision. The NASD panel held that Prudential's termination of Berrafato for "egregious misconduct" was arbitrary and capricious. The NASD panel ruled in favor of Berrafato on his disability and retirement claims but (1) rejected his defamation claim; (2) dismissed his ERISA § 1140 retaliatory discharge claim; (3) refused to fine Prudential for allegedly failing to deliver ERISA plans to

him in a timely fashion; and (4) denied his application for attorney's fees and costs. The District Court upheld the arbitration award in its entirety and concluded "the decision of the arbitrators [cannot] be said to exhibit 'manifest disregard' of the applicable law, the relevant agreements or the evidence." *In re Prudential Ins. Co. Sales Practices Litig.*, No. 954704, slip. op. at 12 (D.N.J. May 11, 2001). Berrafato appeals.[1]

II.

A

Berrafato contends the District Court erred by not finding "manifest disregard for the law" where the NASD panel denied his application for attorneys' fees and costs, denied an ERISA fine, and dismissed his defamation claim without explanation.[2] Berrafato also makes unsubstantiated charges

1. When Prudential moved to compel arbitration, it was no longer a member of the NASD because its membership ended in May 1996. Accordingly, Berrafato contends Prudential lacked standing to compel arbitration. But, Berrafato also requests that we "vacate all portions of the NASD arbitration award except for those portions awarding Berrafato his full retirement and disability benefits." There is no precedent for such a piecemeal approach to arbitral jurisdiction. Because Berrafato "prefers not to jeopardize his full retirement and disability benefits" and "waives the jurisdictional argument under these circumstances," we will treat his jurisdictional argument as waived.

2. Berrafato makes other arguments in his brief, which are either adequately disposed of by the District Court or discarded because they do not appear to be directed at any relief this court, or the District Court, could grant and do not merit discussion here.

of general bias and prejudice against the NASD panel and the District Court.[3]

B

The District Court correctly noted that judicial review of an arbitration award is very deferential. The Federal Arbitration Act ("FAA") "limits the court's role to determining whether the parties received a fair and honest hearing on a matter within the arbitrators' authority. The court may not take issue with the arbitrators' interpretation of the contract. Nor can it consider whether the arbitrators committed an error of law." *Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59, 62 (3d Cir. 1986) (citations omitted). We have held that

> an arbitrator's award must be upheld if the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention; only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award.

U.S. Steel & Carnegie Pension Fund v. McSkimming, 759 F.2d 269, 270-271 (3d Cir. 1985).

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3. We review Berrafato's claim that the panel members were biased and prejudiced for "evident partiality." *See* FAA, 9 U.S.C. § 10(a)(2). In order to show "evident partiality" the challenging party must show a reasonable person would have to conclude that the arbitrator was partial to the other party in the arbitration. *Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503, 1523 n. 30 (3d Cir. 1994) (quotation and citation omitted).

Appendix B

We agree with the District Court that none of the FAA grounds for reversing the arbitrator's award are present in this record. The arbitration decision did not exhibit "manifest disregard" of the applicable law.

III.

Berrafato contends he was defamed in a newspaper article by a Prudential spokesman who allegedly stated, *inter alia*, that Berrafato removed tapes from the local office in order to avoid regulatory compliance review. The only evidence put before the arbitrators was the newspaper article. Berrafato does not cite a single authority in support of his argument and fails to make more than a conclusory statement in his brief that he was defamed. We see no error.

Berrafato also argues that he should have been awarded attorneys' fees and costs under ERISA, 29 U.S.C. § 1132(g). But Berrafato concedes the award of attorneys' fees under this statute is discretionary. 29 U.S.C. § 1132(g). "[T]here is no presumption that a successful plaintiff in an ERISA suit should receive an award in the absence of exceptional circumstances." *McPherson v. Employees' Pension Plan Re-Insurance Co.*, 33 F.3d 253, 254 (3d Cir. 1994) (citation omitted). We have set forth five factors that must be considered when determining whether to grant attorney fees in ERISA cases: (1) offending parties' culpability or bad faith; (2) ability of offending parties to satisfy an award of attorneys' fees; (3) deterrent effect of an award of attorneys' fees against offending parties; (4) benefit conferred on pension plan members as a whole; and (5) relative merits of parties' positions. *Id.* The District Court carefully evaluated all five factors. We find no error in denying attorneys' fees and costs.

Appendix B

The last argument meriting discussion is Berrafato's claim that the District Court erred by not fining Prudential under ERISA for failing to produce a copy of the plan document in a timely manner. Berrafato conceded to the District Court that such a fine is discretionary. Prudential argued that the plan documents were produced to Berrafato in time to avoid any possibility of prejudice. We agree with the District Court that "[i]n light of Berrafato's ultimate victory on the benefits claim, this [avoidance of prejudice argument] appears to be correct. Particularly in the absence of a showing of prejudice, the arbitrators were within their discretion to decline to fine Prudential." *In re Prudential*, No. 954704, slip. op. at 19.

IV.

For the foregoing reasons, we will affirm the District Court's judgment upholding the arbitration award in its entirety.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Anthony J. Scirica
Circuit Judge

DATED: September 3, 2002

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-2320

IN RE: PRUDENTIAL INSURANCE COMPANY OF AMERICA SALES PRACTICE LITIGATION

Paul J. Berrafato,
Appellant

On Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action Nos. 99-cv-04641 & 97-cv-05044
(Honorable Alfred M. Wolin)

Submitted Pursuant to Third Circuit LAR 34.1(a)
July 15, 2002

Before: SCIRICA, ALITO and FUENTES, *Circuit Judges*

JUDGMENT

This cause came to be considered on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit LAR 34.1(a) on July 15, 2002. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered May 15, 2001, be, and the same is hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

Appendix B

ATTEST:

s/ [illegible]
Acting Clerk

DATED: September 3, 2002

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED MAY 11, 2001

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MDL NO. 1061
CIVIL ACTION NO. 95-4704

IN RE: THE PRUDENTIAL INSURANCE COMPANY OF AMERICA SALES PRACTICES LITIGATION

THIS DOCUMENT RELATES TO:

Paul J. Berrafato v.
Prudential Insurance Company of America

N.J. Civ. No. 97-5044

MEMORANDUM OPINION

This matter is opened before the Court upon the petition of Paul J. Berrafato to confirm in part and to vacate in part an arbitration award, and the cross-petition of Prudential Insurance Company of America to confirm the arbitration award. The petitions have been decided upon the written submissions of the parties pursuant to Federal Rule of Civil Procedure 78. For the reasons set forth below, the Court will confirm the arbitration award in its entirety, granting Berrafato's petition in part and denying it in part, and granting Prudential's petition.

Appendix C

BACKGROUND

This matter has been the subject of several opinions of this Court and of other tribunals and the factual background need be set forth here in abbreviated form only. Berrafato is a former Prudential sales agent and later the general manager of one of Prudential's district sales offices. He was terminated in connection with allegations that he had concealed certain video tapes from regulatory compliance inspectors and made misrepresentations and refused to answer questions in a deposition directed to document destruction issues in the Prudential Sales Practices Litigation matter then pending before this Court. Berrafato is an "associated person" in the language of the NASD Code, and signed an NASD Form U-4 providing, *inter alia*, for arbitration of disputes.

Following his termination, Berrafato brought suit against Prudential in the United States District Court for the Northern District of New York claiming that he was entitled to disability and retirement benefits from Prudential. Prudential denied these benefits on the ground that Berrafato was disqualified from receiving them under the terms of the relevant benefit plans, because had been terminated for "egregious misconduct." The matter was transferred to this Court by the Judicial Panel on Multidistrict Litigation. Prudential moved in this Court to compel arbitration of the dispute pursuant to the rules of the NASD.

This Court denied the motion on grounds no longer relevant to this matter. Subsequently, in January 1998, the United States Court of Appeals reversed this Court in several cases involving sales agents' arbitrations, overruling this

Court on the same grounds upon which the Court had denied arbitration in Berrafato's case. *In re Prudential Ins. Co. of Am. Sales Practices Litig. All Agent Actions*, 133 F.3d 225 (3d Cir. 1988). The other agents moved for a rehearing *en banc* and petitioned for a writ of certiorari from the United States Supreme Court. Both applications were denied. On March 10, 1998, this Court dismissed the Berrafato's lawsuit in favor of arbitration before the NASD.

Meanwhile, on January 12, 1998, Michael Barr, Esq., counsel to Prudential, wrote to the Court of Appeals to correct a factual error in its opinion. Although the Third Circuit had written "There is no question that Prudential is a member of the NASD . . . ," 133 F.3d at 229, in fact Prudential had by then withdrawn from the NASD. Neither the motion for rehearing *en banc*, nor the Court of Appeals' denial of that motion on February 23, 1998, mentions the factual error in the opinion regarding Prudential's status as a member of the NASD. The petition for certiorari raised the issue of Prudential's NASD withdrawal. This issue was clearly not the focus of the petition, however, and, of course, the Supreme Court's denial of certiorari did not address it.

Berrafato's arbitration followed and an award was rendered in September of 1999. The parties appeared before this Court with a petition and cross-petition seeking confirmation and/or vacation of the arbitral award. After soliciting additional submissions, this Court determined in a Letter Opinion dated March 17, 2000, that the arbitration was incomplete and the Court remanded the matter back to the NASD arbitration panel for further findings.

Appendix C

Some months later, in September of 2000, Berrafato moved before the Court of Appeals to "Recall the Mandate and Correct the Judgment." This motion raised as its primary factual basis that the Court of Appeals' opinion of January 1998 had assumed, incorrectly, that Prudential was a member of the NASD when that opinion was written. The thrust of the motion was that, because Prudential withdrew from the NASD in May of 1996, and because Berrafato was terminated after that date, the Court of Appeals' should find that Berrafato's claims were not subject to arbitration and that the 1998 opinion should be amended accordingly. The Court of Appeals denied this motion without opinion on October 27, 2000.

On November 2, 2000, the NASD arbitration panel rendered the award that is the subject of the instant petitions. Over the dissent of one of the three arbitrators, Berrafato appears to have won on the basic merits of his disability and pension claim. The majority held that Prudential's termination of Berrafato for "egregious misconduct" was arbitrary and capricious. The panel reduced the holding to a specific benefit amount to be paid by Prudential. Berrafato had also made claims for defamation, for a fine of Prudential arising out of certain alleged ERISA disclosure violations, and for attorneys fees. These were dismissed by the arbitration panel as without merit.

Berrafato seeks confirmation of the award of benefits and Prudential, while disagreeing with the panel's decision, does not contest this part of Berrafato's application. The parties do disagree, however, over the merits of the panel's dismissal of Berrafato's other claims. Finally,

inconsistently with his desire to confirm the award of benefits, Berrafato contends that the NASD arbitrators never properly had jurisdiction at all. Berrafato maintains that the factual inaccuracy regarding Prudential's NASD membership status has never been resolved and, therefore, that the Court of Appeals' January 1998 opinion should not have been read to require arbitration of his claim.

DISCUSSION

1. Arbitrability and the Scope of Review

Judicial review of an arbitration award is among the most deferential known to the law. Both parties have relied upon the Federal Arbitration Act ("FAA") and case law developed under it (although Berrafato has preserved his objection to arbitration in the first place). The Court will look to federal law under the FAA because this matter concerns an arbitration agreement connected to a transaction involving interstate commerce. *State Farm Mut. Auto. Ins. Co. v. Coviello*, 233 F.3d 710, 713 (3d Cir. 2000); *PaineWebber Inc. v. Hartmann*, 921 F.2d 507, 510 (3d Cir. 1990). Under the FAA, a court may vacate an arbitration award only where it is shown to be a product of corruption, fraud, the arbitrators refuse to consider material evidence, or the arbitrators exceed their power. 9 U.S.C. § 10.

Berrafato has not contested that the scope of the arbitration agreement embodied in NASD Form U-4 and the NASD Code includes claims for benefits or claims brought under ERISA. *See also Williams v. Imhoff*, 206 F.3d 758, 766-67 (10th Cir. 2000) (ERISA claims of associated persons

subject to mandatory arbitration under Form U-4 and NASD Code). His continued objection to the arbitration is based upon his claim that Prudential lacks standing. This argument is discussed below. That Form U-4 and the NASD Code require arbitration of Berrafato's non-ERISA claims is clear from *Wood v. Prudential Ins. Co. of Am.*, 207 F.3d 674, 680-81 (3d Cir.), *cert. denied*, 121 S. Ct. 305 (2000).

The FAA "limits the court's role to determining whether the parties received a fair and honest hearing on a matter within the arbitrators' authority. The court may not take issue with the arbitrators' interpretation of the contract. Nor can it consider whether the arbitrators committed an error of law." *Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59, 62 (3d Cir. 1986) (citations omitted). "[A] federal court may not overrule an arbitrator's decision simply because the court believes its own interpretation of the contract would be the better one." *W.R. Grace & Co. v. Local 759, International Union of the United Rubber Workers*, 461 U.S. 757, 764 (1983) (citing *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960)). The Third Circuit has held that "an arbitrator's award must be upheld if the interpretation can in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties' intention; only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award." *U.S. Steel & Carnegie Pension Fund v. McSkimming*, 759 F.2d 269, 270-71 (3d Cir. 1985); *see also Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503, 1520 (3d Cir. 1994) ("manifest disregard" standard applies to review of

underlying merits of arbitrator's decision), *aff'd*, 514 U.S. 938 (1995).

Berrafato contends that this Court should perform a more intrusive review of the arbitrators' decision because it affects "public policy rights." Reply Brf. at 7. Berrafato relies upon *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), which held that claims under the Americans with Disabilities in Employment Act may be subject to arbitration under the FAA. *Gilmer* does not support Berrafato's reading of it; indeed, the *Gilmer* Court quotes the FAA's deferential standard of judicial review and holds that this will be sufficient to guard against claims of bias. *Id.* at 30-31. In the passage cited by Berrafato, the Supreme Court wrote that judicial review would "ensure that arbitrators comply with the requirements of the statute at issue." *Id.* at 32 n.4 (quoting *Shearson/ American Express Inc. v. McMahon*, 482 U.S. 220, 232 (1987)). This hardly compels the conclusion that simple errors of law will justify vacating an arbitral award whenever a federal statute is involved. Indeed, this passage was recently described by Judge Easterbrook as *dictum* and "unhelpful" in divining the true nature of the manifest disregard standard. *George Watts & Son, Inc. v. Tiffany and Co.* __ F.3d __, __, 2001 WL 376322, *2 (7th Cir. April 16, 2001).

The Third Circuit has held unequivocally that statutory ERISA claims are arbitrable under the FAA, *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1116 (3d Cir. 1993), given the lack of evidence that Congress intended to single out such statutory claims from the presumption favoring arbitration. Other courts have applied the traditional, deferential standard of review to arbitration

of ERISA claims. *See, e.g., Max Marx Color & Chem. Co. Employees' Profit Sharing Plan v. Barnes*, 37 F. Supp. 2d 248, 253-54 (S.D.N.Y. 1999); *Shearson Lehman Bros., Inc. v. Neurosurgical Assocs. of Indiana, P.C.*, 896 F. Supp. 844 (S.D. Ind. 1995). Following the logic of *Pritzker*, this Court is aware of no evidence that Congress, while envisioning arbitration of ERISA claims, intended to exempt arbitrators' rulings on those claims from the normal, highly deferential review mandated by the FAA. Berrafato supplies no authority directly in favor of more intrusive review of the claims asserted here. Therefore, the Court holds that the standard of review set forth by section 10 of the FAA and the case law properly applies to the arbitrators' decision on Berrafato's benefits. *See also Gilmer*, 500 U.S. at 30-31.

Whether a court has properly referred a matter to arbitration in the first place is a different question. *See Prudential*, 133 F.3d at 227 n.1 (review of decision to arbitrate is plenary). The objection raised by Berrafato continues to be Prudential's standing to insist on arbitration. This issue was ruled upon by the Court and, indirectly, by the Court of Appeals.

The Court rejects Berrafato's contention that referral to arbitration is still an open question in this case. As noted, Berrafato's position relies upon the Court of Appeal's factual misunderstanding in its January 1998 opinion regarding Prudential's NASD membership status. However, Berrafato drew that point to the attention of the Court of Appeals in emphatic terms in his motion to "Recall the Mandate and Correct the Judgment." Berrafato specifically argued that Prudential's true NASD membership status compelled the

conclusion that this matter was not arbitrable. The Court of Appeals denied the motion, and this Court must consider it settled that the NASD membership issue does not affect the arbitrability of this matter.

Even without the guidance provided by the denial of Berrafato's motion by the Court of Appeals, or alternatively even if, as Berrafato suggests, the Court of Appeals denied his motion on procedural grounds, this Court would come to the same conclusion. The reasoning of the Court of Appeal's January 1998 decision leaves no doubt that Prudential's withdrawal from the NASD does not affect the arbitrability of claims between Prudential employees who signed NASD Form U-4 and their employer.

> While Form U-4 is only an agreement between the NASD and the applicant, it was adopted as a broader effort by self-regulatory organizations, including the NASD, to regulate the securities industry. The intention, as Form U-4 unambiguously indicates, was not limited to arbitrating disputes between the NASD and the applicant or member "firms" explicitly recognized in the text. Rather, the arbitration agreement and the NASD Code of Arbitration establish certain classes of individuals—member firms of the NASD, customers, and so on—who would benefit from the applicant's agreement with the NASD. The applicant, in return, would become a registered broker with the NASD and could properly conduct business under the federal securities laws. Therefore, we have no doubts that

> the parties to Form U-4 unequivocally intended that each applicant would submit to arbitration against nonsignatory third parties such as Prudential.
>
> A holding that would restrict the right of these third parties to invoke arbitration because they had not signed Form U-4 would essentially require the NASD and the applicants to seek explicit textual recognition of all intended beneficiaries, whether known or unknown. We think such a requirement would frustrate the purpose and text of Form U-4 and accordingly hold that Prudential may properly seek enforcement of the arbitration clause against the plaintiffs.

133 F.3d at 230.

The foregoing passage makes it evident that the Court of Appeals' reference to Prudential as an NASD member was not material to its holding. Clearly, the arbitration provision of the Form U-4 and the rules of the NASD bind Berrafato. The rule of the January 1998 opinion compels arbitration of claims by Berrafato against "all intended beneficiaries, whether known or unknown." *Id.* This easily encompasses Berrafato's claims against Prudential arising out of his activities as an "associated person," regardless of whether Prudential is a signatory to the U-4 and, more to the point in this case, regardless of whether Prudential is an NASD member.

Appendix C

2. The Merits of the Arbitrators' Award

It being settled that arbitration was proper, there is no dispute between the parties that the award of disability and pension benefits should be confirmed. The balance of the disputed issues concern Berrafato's claim that the arbitrators improperly dismissed his claims for defamation, for fines against Prudential for ERISA violations, and for attorneys fees. None of the grounds for reversing the arbitrators set forth in the FAA are present on this record. Nor can the decision of the arbitrators be said to exhibit "manifest disregard" of the applicable law, the relevant agreements or the evidence. Therefore, the Court will uphold the arbitration award in its entirety.

The defamation claim was based upon a newspaper account of a Prudential executive stating that Berrafato had concealed evidence from a regulatory compliance inspection. Prudential argues that the only evidence adduced before the arbitrators was the newspaper itself. Berrafato does not contradict this assertion. A newspaper article cannot substitute for competent evidence that the Prudential executive actually said what he was quoted as saying. There was no error in dismissing this claim by the arbitrators, and certainly no error that would justify vacating the decision under the controlling law.

Berrafato also claims he should have been awarded attorneys fees and costs, under ERISA, 29 U.S.C. § 1132(g). An order of attorneys fees to a prevailing ERISA plan participant or beneficiary under this statute is discretionary. The tribunal looks to (1) culpability or bad faith of the

fiduciary; (2) the ability to pay; (3) deterrent effect; (4) the benefit conferred on other members of the plan; and (5) the relative merits of the parties' positions. *McPherson v. Employees' Pension Plan of American Re-Insurance Co., Inc.*, 33 F.3d 253, 254 (3d Cir. 1994); *Ursic v. Bethlehem Mines*, 719 F.2d 670, 673 (3d Cir. 1983). Reviewing the record of this matter, the Court finds ample grounds for a contrary conclusion to that reached by the arbitrators and that a denial of the benefits claimed by Berrafato would have been defensible. Indeed, the dissenting arbitrator would have ruled in favor of Prudential. "[T]here is no presumption that a successful plaintiff in an ERISA suit should receive an award in the absence of exceptional circumstances." *McPherson*, 33 F.3d at 254 (citing *Ellison v. Shenango, Inc. Pension Bd.*, 956 F.2d 1268, 1273 (3d Cir. 1992)). It cannot be said on this record that the relative merits of the parties' positions are so lopsided as to compel an award of attorneys fees.

The same reasons that make this an arguable case on the merits provide evidence that would support a finding by the arbitrators that Prudential did not act in bad faith. The Court understands that factors (1) and (5) are independent of each other and that a party may be culpable without having acted in bad faith or with an ulterior motive. *McPherson*, 33 F.3d at 254. Here, however, where the employer pressed substantial arguments that would both have justified its action with respect to the beneficiary as a legal matter as well as provided a good-faith basis for it, the arbitrators may rationally reject those arguments on the merits of the denial of benefits, but accept that a fee shifting award is not appropriate.

The other three factors are also not so one-sided as to mandate vacation of the arbitral award. The mere fact of Prudential's financial resources compared to Berrafato's cannot justify such an award. *Id.* More fundamentally, the law gives discretion to the arbitrators on this issue. Consequently, the Court will confirm the arbitrators' dismissal of Berrafato's claim for attorneys fees and costs.

Berrafato raises a number of additional arguments. Many of these do not appear to be directed to any substantive relief this Court could grant. For instance, that Prudential has not yet started paying the benefits, if true, cannot be the subject of relief from this Court where the motion before it is solely to confirm or to vacate the award. Likewise, Berrafato makes no claim for substantive relief by complaining that the arbitrators unfairly granted a confidentiality order, particularly where Berrafato won on the underlying claim. Finally, Berrafato complains of the "bizarre dissent" from the award by the chairman of the three-member panel. The parties are assured that the Court has studied each of the points raised. Those not mentioned in this Opinion were deemed not worthy of discussion.

One of these arguments does merit brief discussion, however. Berrafato claims that the arbitrators wrongfully denied his claim under 29 U.S.C. § 1140 that Prudential terminated him solely to avoid paying protected benefits. Even Berrafato concedes, however, that any substantive relief he might win under the section 1140 claim has been subsumed by the benefits he has already won through his direct claim of entitlement. Berrafato argues, however, that the possibility that he would have prevailed upon two distinct ERISA theories strengthened his case for attorneys' fees.

In connection with this claim, Berrafato argues that the arbitrators wrongly refused to consider certain documentary evidence regarding cost-cutting measures at Prudential. Subsection 10(a)(3) of the FAA provides that this Court "may vacate the award . . . [w]here the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy. . . ." To the extent excluding this evidence undermined his section 1140 claim, Berrafato contends, the Court should vacate the denial of attorneys fees on the ground of the arbitrators' alleged misconduct for refusing to consider evidence.

Many years ago, in *Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co.*, 397 F.2d 594 (3d Cir.), *cert. denied*, 393 U.S. 954 (1968), the Third Circuit discussed what will constitute "misconduct" by arbitrators in failing or refusing to consider evidence. It is clear that an exclusion of evidence resulting from mistaken ruling of law will not, by itself, justify disturbing the award. *Id.* at 599. "A fair accommodation between the words of the statute and the characteristic nature of arbitration would require that such an error must be one that is not simply an error of law, but which so affects the rights of a party that it may be said that he was deprived of a fair hearing." *Id.*; *see also Apex Fountain Sales, Inc. v. Kleinfeld*, 818 F.2d 1089, 1094-95 (3d Cir. 1987).

In support of his argument that the arbitrators failed to consider material evidence, Berrafato claims that the panel wrongfully quashed his *subpoenas duces tecum* seeking evidence of Prudential financial information alleged to be relevant to the theory that Berrafato was terminated for

economic reasons. As the Court reads the transcript, however, it appears that Berrafato's counsel agreed that he could obtain the same evidence by examining a Prudential executive, Mr. Duff, at the hearing. (A529). In any event, the subpoenas were served less than a month before the hearing commenced, although ample time had been provided for discovery previously. Prudential vehemently objected to this procedural irregularity. In these circumstances, it was neither error nor misconduct by the arbitrators to quash the subpoenas.

Another evidentiary complaint by Berrafato concerns a memorandum known as the "Gillen memo." This document was inadvertently produced by Prudential, despite the fact that it had previously been identified on a Prudential document log as subject to the attorney-client privilege. Prudential moved to compel its return. At a hearing on the motion it was represented by Berrafato's counsel that the Gillen memo concerned document destruction issues. Berrafato's counsel argued that any attorney-client privilege was vitiated by the crime/fraud exception arising out of allegations that Prudential had wrongfully destroyed documents, and that the Gillen Memo should be admissible in evidence to rebut Prudential's case.

Prudential proffered that it would raise no issues of document destruction in the arbitration. Berrafato now characterizes that proffer as an undertaking that Prudential would not pursue its theory that Berrafato was terminated for misconduct in connection with his compliance responsibilities, including the issue of concealing video tapes from inspectors. He maintains that the Gillen Memo contains, in addition to facts regarding document destruction,

information regarding cost cutting and staff reduction at Prudential that would have supported his claim that he was terminated to avoid Prudential's benefit obligations.

Of course, Prudential's main defense in the arbitration was that Berrafato was terminated for egregious misconduct over the compliance issue. Having reviewed the appropriate transcript, the Court is satisfied that Berrafato's characterization of Prudential's undertaking is overbroad.[1] Prudential offered to forebear from accusing Berrafato of document destruction. The company did not waive all rights to raise Berrafato's alleged compliance-related misfeasance. Therefore, even assuming there was an agreement, Prudential did not violate it. In any event, the portion of the Gillen Memo directed to cost-cutting was redundant to other evidence before the arbitrators. For example, an e-mail (A257) by Martin H. Duff of Prudential regarding costcutting, including an ominous reference to "separation" of staff from the company, was admitted into evidence. (A928-29) Another Prudential executive testified at length regarding waves of staff terminations at Prudential. (A783)

Lastly, Berrafato complains that the arbitrators should have fined Prudential pursuant to various sections of ERISA for failing timely to produce a copy of the plan document. Berrafato concedes that such a fine is discretionary, but argues that "[t]he fine should be automatic absent compelling circumstances to the contrary." Reply Brf. at 35. Berrafato offers no authority that this is an accurate statement of the

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1. It also appears that counsel were not able actually to come to terms regarding the Gillen memo, and that no agreement was actually in place when the hearing started.

law. Nor does he allude to any evidence that would justify setting aside the arbitrators' discretion in refusing to award a fine. Prudential argues that the plan documents were produced to Berrafato in time to avoid any possibility of prejudice to him. In light of Berrafato's ultimate victory on the benefits claim, this appears to be correct. Particularly in the absence of a showing of prejudice, the arbitrators' were within their discretion to decline to fine Prudential.

CONCLUSION

For the reasons set forth above, the Court will confirm the arbitration award in its entirety, grant Berrafato's petition in part and deny it in part, and grant Prudential's petition.

An appropriate Order is attached.

Dated: May 11, 2001

s/ Alfred M. Wolin
ALFRED M. WOLIN, U.S.D.J.

Appendix C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MDL NO. 1061
CIVIL ACTION NO. 95-4704

IN RE: THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA SALES PRACTICES LITIGATION

THIS DOCUMENT RELATES TO:

Paul J. Berrafato v.
Prudential Insurance Company of America

N.J. Civ. No. 97-5044

ORDER

In accordance with the Court's Memorandum Opinion filed herewith,

It is on this 11th day of May, 2001

ORDERED that the arbitration award of November 2, 2000 that is the subject of this action is affirmed in its entirety; and it is further

ORDERED that Berrafato's petition is granted in part and denied in part; and it is further

ORDERED that Prudential's petition is granted.

s/ Alfred M. Wolin
ALFRED M. WOLIN, U.S.D.J.